

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 395 Transportation

SPONSOR(S): Andrade

TIED BILLS: **IDEN./SIM. BILLS:** SB 1172

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Transportation & Infrastructure Subcommittee		Johnson	Vickers
2) Transportation & Tourism Appropriations Subcommittee			
3) State Affairs Committee			

SUMMARY ANALYSIS

The bill amends various statutory provisions relating to transportation. In summary, the bill:

- Requires the Florida Transportation Commission to establish and adjust the salary of the Secretary of Transportation based on a market analysis of the salaries of comparatively skilled individuals.
- Sets the minimum salary of the Secretary of Transportation at \$180,000 per year.
- Extends the length of time certain competitive solicitations required by the Department of Transportation (DOT) are exempt from public records requirements.
- Authorizes construction vehicles and portable radar speed display units to display flashing blue lights under certain circumstances.
- Authorizes the use of flashing lights on vehicles during periods of extreme low visibility under certain circumstances.
- Clarifies qualification requirements for contractors desiring to bid on DOT contracts in excess of \$50 million.
- Requires contractors seeking DOT certification as qualified to bid on certain projects to submit specified financial statements.
- Revises liability provisions for DOT contractors under certain conditions.
- Authorizes the Governor, instead of the Secretary of Transportation to suspend tolls in an emergency evacuation and requires suspended tolls to be reinstated when certain conditions are met.

DOT may incur additional operating expenditures associated with salary adjustments. The Florida Transportation Commission will incur expenditures associated with conducting a market analysis to ascertain compensation levels for the Secretary of Transportation. There may be an impact to state and local government revenues due to the automatic reinstatement of tolls following an emergency evacuation. See Fiscal Analysis for details.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

DOT Executive Salaries

Present Situation

Department of Transportation

The Department of Transportation (DOT) is created as a decentralized agency, consisting of seven geographic districts, the Florida Turnpike Enterprise, and the Florida Rail Enterprise.¹

DOT is headed by the Secretary of Transportation, who is appointed by the Governor from among three persons nominated by the Florida Transportation Commission (FTC), subject to Senate confirmation.² The Secretary of Transportation must be a proven, effective administrator who by a combination of education and experience clearly possesses a broad knowledge of the administrative, financial, and technical aspects of the development, operation, and regulation of transportation systems and facilities or comparable systems and facilities.³

The Secretary of Transportation may appoint up to three assistant secretaries who are directly responsible to the secretary, and who perform such duties as are assigned by the secretary. The secretary may delegate to any assistant secretary the authority to act in the absence of the secretary.⁴ The Secretary of Transportation and DOT's assistant secretaries are exempt from the Career Service System⁵ and must be compensated commensurate with their qualifications and competitive with compensation for comparable responsibility in the private sector.⁶

Florida Transportation Commission

The FTC is a nine-member citizen's advisory board for DOT. While specifically prohibited from entering into DOT's day to day operations, the FTC:

- Reviews major transportation policy initiatives or revisions submitted by DOT.
- Recommends transportation policy to the Governor and Legislature.
- Serves as an oversight body for DOT.
- Serves as an oversight body for statutorily-created transportation authorities.⁷

Secretary of Transportation Compensation

Rule 60L-32.001, F.A.C., states that "upon appointment, an agency shall set an employee's base rate of pay within the pay band for the broadband level to which appointed." In the State Personnel System, most agency heads are in Pay Band 25, with a salary range of \$68,135.86 - \$318,327.74. While the broad-banding system is the State Personnel System's official classification/compensation system, for planning and budgeting purposes the Legislature and the Office of Policy and Budget use the state's former pay grade system. Under the former pay grade system, Pay Grade 95, which is associated with the most agency heads, including the Secretary of Transportation, has salary a range of \$77,470.12 - \$184,557.21.⁸ However, unless a specific salary is set by law or in the General Appropriations Act, the salaries of agency heads are determined by the appointing person or entity.⁹

¹ Section 20.23(4)(a), F.S.

² Section 20.23(1)(a), F.S.

³ Section 20.23(1)(b), F.S.

⁴ Section 20.23(1)(d), F.S.

⁵ Part III of Ch. 110, F.S.

⁶ Section 20.23(1)(e), F.S.

⁷ Section 20.23(2), F.S. FTC website, <http://www.ftc.state.fl.us/aboutus.shtm> (Last visited Jan. 22, 2020).

⁸ Exceptions include the Chancellor of the Board of Governors, the Executive Director of the Department of Citrus, and the State Surgeon General.

⁹ Email from Andrew Forst, Deputy Legislative Affairs Director, Department of Management Services, RE: HB 395-Transportation (Oct. 25, 2019).

The Secretary of Transportation's current salary is \$142,500 per year.¹⁰

Effect of the Bill

The bill requires that the Secretary of Transportation and any assistant secretaries be compensated commensurate with his or her qualification and competitive with compensation for persons with comparable responsibility in both other public sector organizations and the private sector.

The bill requires the FTC to establish and adjust the Secretary of Transportation's salary according to a market analysis focused on comparably skilled individuals in other public sector organizations¹¹ and on comparably skilled individuals in the private sector. The market analysis must serve as a basis for ascertaining compensation levels required to retain the Secretary of Transportation in the position within DOT and to attract external individuals whose talents can fulfill DOT's mission and effect change. This market analysis must be updated before the appointment of a new Secretary of Transportation.

The bill also sets the minimum salary for the Secretary of Transportation at \$180,000 per year.

DOT Competitive Solicitations-Public Records Exemption

Present Situation

Public Records

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law, for the exemption of records from the requirements of Article I, section 24(a).¹² The general law must only contain such exemptions and state with specificity the public necessity justifying the exemption¹³ and must be no more broad than necessary to accomplish its purpose.¹⁴

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act¹⁵ provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protect trade or business secrets.¹⁶

Section 119.071(1), F.S., provides general exemptions from the inspection or copying of public records, including an exemption for sealed bids, proposals, or replies received by an agency¹⁷ pursuant to a

¹⁰ Florida Has A Right to Know, State Employee's Salaries: Available at: https://salaries.myflorida.com/?utf8=%E2%9C%93&by_name=Thibault&by_agency=FL+Dept+of+Transportation&by_class_code=&min_salary=0&max_salary=317200 (Last visited Dec. 9, 2019).

¹¹ These public sector organizations, include, but are not limited to, expressway authorities, aviation authorities, and port authorities.

¹² Art. I, s. 24(c), Fla. Const.

¹³ This portion of a public record exemption is commonly referred to as a "public necessity statement."

¹⁴ Art. I, s. 24(c), Fla. Const.

¹⁵ Section 119.15, F.S.

¹⁶ Section 119.15(6)(b), F.S.

¹⁷ Section 119.011(2), F.S., defines the term "agency" as any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

competitive solicitation¹⁸ until such time as the agency provides notice of an intended decision or until 30 days after opening the bids, proposals, or final replies, whichever is earlier.¹⁹

DOT's Competitive Solicitation Authority

Section 337.11, F.S., authorizes DOT to enter into contracts for the construction and maintenance of all roads placed under its supervision. DOT may also enter into contracts for the construction and maintenance of various structures used in connection with such facilities.²⁰ The statute provides requirements for contracts that DOT may enter into, including requirements for advertisement, the awarding of contracts, bid protests, design-build contracts, supplemental agreements, and certain required provisions in this contract. However, s. 337.11, F.S., does not contain a separate public records exemption for the documents required for competitive solicitations.

Effect of the Bill

The bill amends s. 119.071(1)(b)2., F.S., providing that DOT's competitive solicitations under s. 337.11, F.S., are exempt from public records requirements until 90 days, instead of the current 30 days, after opening the bids, proposals, or final replies, whichever is earlier.

Display of Blue Lights

Present Situation

Florida law prohibits blue lights on any vehicle or equipment, except police vehicles, and vehicles of the Department of Corrections or any county correctional agency when responding to emergencies.²¹

Road or street maintenance equipment, road or street maintenance vehicles, road service vehicles, refuse collection vehicles, petroleum tankers, and mail carrier vehicles are authorized to display amber lights when in operation or a hazard exists.²² Additionally, road maintenance and construction equipment and vehicles may display flashing white lights or flashing white strobe lights when in operation and where a hazard exists.²³

Effect of the Bill

The bill authorizes construction vehicles within a work zone on roadways with a posted speed limit of 55 miles per hour or more to use flashing blue lights in conjunction with paving operations or where a hazard exists.

The bill also authorizes portable radar speed display units in advance of a work zone on roadways with a posted speed limit of 55 miles per hour or more to show or display flashing red or blue lights when workers are present.

Flashing Lights on Vehicles

Present Situation

Flashing lights are prohibited on vehicles except:

- As a means of indicating a right or left turn, to change lanes, or to indicate that the vehicle is lawfully stopped or disabled upon the highway;
- When a motorist intermittently flashes his or her vehicle's headlamps at an oncoming vehicle notwithstanding the motorist's intent for doing so; and
- For various lamps authorized in statute, which may flash.²⁴

¹⁸ Section 119.071(1)(b)1., F.S. defines the term "competitive solicitation" as a process of requesting and receiving sealed bids, proposals, or replies in accordance with the terms of a competitive process, regardless of the method of procurement.

¹⁹ Section 119.071(1)(b)2., F.S.

²⁰ Section 337.11(1), F.S.

²¹ Section 316.2397(2), F.S.

²² Section 316.2397(4), F.S.

²³ Section 316.2397(5), F.S.

²⁴ Section 316.2397(2), F.S.

A violation is a noncriminal traffic infraction, punishable as a nonmoving violation. The statutory base fine is \$30, but with additional fees and surcharges, the total fine is up to \$108.²⁵

With the exception of funeral processions,²⁶ Florida law does not expressly authorize the use of hazard lights in moving vehicles. The Florida Driver Handbook indicates you **should not** use your emergency flashers in instances of low visibility or rain, and may only be used when a vehicle is broken down or stopped on the side of the road.²⁷

Effect of the Bill

The bill authorizes the use of flashing lights during periods of extreme low visibility on roadways with a posted speed limit of 55 hours or more. This provision effectively authorizes the use of hazard lights on moving vehicles under specified circumstances.

DOT Application for Qualification

Present Situation

Any contractor desiring to bid for the performance of any construction contract in excess of \$250,000 which DOT proposes to let must first be certified by DOT as qualified pursuant to s. 337.14, F.S., and DOT's rules.^{28, 29}

Any contractor who is not qualified and in good standing with DOT as of January 1, 2019, and desires to bid on contracts in excess of \$50 million must have satisfactorily completed two projects, each in excess of \$15 million, for DOT or for any other state department of transportation.³⁰

Each application for certification must be accompanied by the applying contractor's latest annual financial statement, which must have been completed within the last 12 months. If the application or the annual financial statement shows the applying contractor's financial condition more than four months prior to the date on which DOT receives the application, the applying contractor must also submit an interim financial statement and an updated application. The interim financial statement must cover the period from the end date of the annual statement and must show the financial condition of the applying contractor no more than four months prior to the date that DOT receives the interim financial statement. Each required annual or interim financial statement must be audited and accompanied by the opinion of a certified public accountant.³¹

Effect of the Bill

The bill provides that any contractor who desires to bid on contracts in excess of \$50 million must, in addition to have successfully completed two projects, each in excess of \$15 million for DOT or another state transportation department, must also first be certified by DOT as qualified.

The bill requires each application for certification to be accompanied by audited, certified financial statements prepared in accordance with United States generally accepted accounting principles and United States generally accepted auditing standards by a certified public accountant licensed in this state or another state. The applying contractor's audited, certified financial statements must be specifically for the applying contractor and must have been prepared within the immediately preceding 12 months. DOT may not consider any financial information relating to the parent entity of the applying contractor, if any. DOT may not certify as qualified any applying contractor that fails to submit the required audited, certified financial statements.

²⁵ Florida Association of Clerks and Comptrollers; *2019 Distribution Schedule of Court Related Filing Fees, Service Charges, Costs and Fines, including a Fee Schedule for Recording-Effective July 1, 2019*, p. 21. Available at: https://cdn.ymaws.com/www.flclerks.com/resource/resmgr/advisories/advisories_2019/19bull053_Attach_1_2019_Dist.pdf (last visited Nov. 8, 2019).

²⁶ Section 316.1974(3)(c), F.S.

²⁷ Department of Highway Safety and Motor Vehicles, *2018 Florida Driver Handbook*, available at: <https://www3.flhsmv.gov/handbooks/englishdriverhandbook.pdf> (last visited Oct. 30, 2019).

²⁸ DOT's rules regarding qualifications to bid are contained in Ch. 14-22, F.A.C.

²⁹ Section 337.14(1), F.S.

³⁰ *Id.*

³¹ *Id.*

If the application or the annual financial statement shows the applying contractor's financial condition more than four months before the date on which DOT receives the application, the applying contractor must also submit interim audited, certified financial statements prepared in accordance with United States generally accepted accounting and auditing principles and standards. Financial statements must be prepared by a certified public accountant licensed in this state or another state.

Limits of Liability

Present Situation

Under Florida law, a contractor who constructs, maintains, or repairs a transportation facility for DOT is not liable for personal injury, property damage, or death arising from the performance of the construction, maintenance, or repair if, at the time of the incident, the contractor was in compliance with contract documents material to the condition that was the proximate cause of the incident.³²

This limitation on liability does not apply when the proximate cause of the incident is a latent condition, defect, error, or omission that was created by the contractor and not a defect, error, or omission in the contract documents; or when the proximate cause of the personal injury, property damage, or death was the contractor's failure to perform, update, or comply with the maintenance of the traffic safety plan as required by the contract documents.³³

DOT's Contractor Past Performance Rating (CPPR) regime tracks various categories of a contractor's performance during the course of a construction project, including the contractor's conformance with contract documents.^{34, 35} This regime is not set forth in statute, but in DOT's procedures. Categories tracked in DOT's CPPR regime include: the number of performance deficiency letters issued; whether active progress is being made with sufficient labor, materials, and equipment; effectiveness in minimizing impacts to the traveling public; timely and complete submission of documents; timely completion of the project; success in mitigating costs and time overruns; conformance with contract documents; and the utilization of disadvantaged business enterprises.³⁶

Effect of the Bill

The bill provides that in all incidents involving personal injury, property damage or death, a contractor who constructs, maintains, or repairs transportation facilities for DOT is not liable for personal injury, property damage, or death arising from the contractor's performance if, at the time of the incident, the contractor was in compliance with contract documents material to the condition that was the proximate cause of the personal injury, property damage, or death. This limitation on liability applies when, at the time of the incident, the contractor is deemed in compliance with the contract and DOT's CPPR indicates conformance with the contract documents.

This change appears to limit a contractor's liability for DOT projects if the contractor is deemed in compliance with the contract and DOT's CPPR indicates conformance with the contract documents at the time of the incident.

Suspension of Tolls

Present Situation

Payment of Tolls

With limited exceptions, the payment of tolls is required for the use of toll facilities.³⁷ One exception is that the Secretary of Transportation, or his or her designee, may suspend tolls when necessary to

³² Section 337.195(2), F.S.

³³ Section 337.195(2)(a), F.S.

³⁴ This regime is described in DOT Form 700-101-25, which is incorporated by reference into rule 14-22.003, F.A.C.

³⁵ Department of Transportation, Agency Analysis of 2019 House Bill 395 p. 3.

³⁶ DOT Form 700-010-25 (Copy on file with Transportation & Infrastructure Subcommittee).

³⁷ Section 338.155(1)(a), F.S.

assist in an emergency evacuation.³⁸ However, there is no statutory guidance as to when the suspended toll must be reinstated.

State Emergency Operations Center

The Division of Emergency Management (DEM), within the Executive Office of the Governor, operates the State Emergency Operations Center (EOC) as the central clearinghouse for disaster-related information, and requests for deployment of assistance. The EOC has the following *statewide* levels activation:

- *Level 1*-Full scale activation, the EOC is staffed with DEM personnel and all emergency support functions.
- *Level 2*-Activation of State Emergency Response Team, all primary emergency support functions are notified and the EOC is staffed with DEM personnel and necessary emergency support functions.
- *Level 3*-Monitoring Activation-This is a monitoring phase with the EOC staffed with State Warning Point Communications and DEM staff.³⁹

Effect of the Bill

The bill transfers to the Governor, from the Secretary of Transportation, the authority to suspend tolls to assist in emergency evacuations. The bill requires tolls to be automatically reinstated when the county in which such tolls are collected resumes a Level 3 activation at the State Emergency Operations Center. The Governor may override the automatic reinstatement in extraordinary circumstances.

B. SECTION DIRECTORY:

Section 1 amends s. 20.23, F.S., relating to the Department of Transportation.

Section 2 amends s. 119.071, F.S., providing general exemptions from the inspection or copying of public records.

Section 3 amends s. 316.2397, F.S., providing that certain lights are prohibited.

Section 4 amends s. 337.146, F.S., providing for applications for qualification and certificates of qualification.

Section 5 amends s. 338.155, F.S., requiring the payment of tolls.

Section 6 provides an effective date of July 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Indeterminate. There may be a change in state toll revenues associated with provisions related to the automatic reinstatement of tolls. However, since the suspension of tolling is authorized during emergency evacuations, the impact on state revenues is indeterminate and cannot be quantified.

2. Expenditures:

Indeterminate. According to DOT, there will be an indeterminate increase in expenditures associated with minimum salary requirements for the Secretary of Transportation, which will require additional budget authority and salary rate. Additionally, the FTC will need additional budget

³⁸ Section 338.155(1)(b), F.S.

³⁹ Florida Division of Emergency Management Website, EOC Activation Levels, <https://www.floridadisaster.org/sert/eoc-activation-levels/> (Last visited Oct. 25, 2019).

authority in order to conduct the required salary analysis, due to insufficient resources to redirect base budget from its other core mission tasks.⁴⁰

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Indeterminate. Local toll agencies may experience a change in toll revenues associated with provisions related to the automatic reinstatement of tolls. However, since the suspension of tolling is authorized during emergency evacuations, the impact on local government revenues is indeterminate and cannot be quantified.

2. Expenditures:

This bill does not appear to impact local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Public Records

As previously stated, Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law, for the exemption of records from the requirements of Article I, section 24(a).⁴¹ The general law must only contain such exemptions and state with specificity the public necessity justifying the exemption⁴² and must be no more broad than necessary to accomplish its purpose.⁴³

Section 2 of the bill expands an existing public records exemption for certain documents related to competitive solicitations. Therefore, this provision must be in a separate bill and requires a 2/3 vote of each chamber of the Legislature for passage.

B. RULE-MAKING AUTHORITY:

DOT may need to amend Rule 14-22, F.A.C., regarding qualifications to bid on construction projects to incorporate changes made in the bill.

⁴⁰ Department of Transportation, Agency Analysis of 2020 House Bill 395, p. 5, January 8, 2020.

⁴¹ Art. I, s. 24(c), Fla. Const.

⁴² This portion of a public record exemption is commonly referred to as a "public necessity statement."

⁴³ Art. I, s. 24(c), Fla. Const.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues

The requirement that the FTC establish and adjust the Secretary of Transportation's salary is effective upon this act becoming law. However, the bill's effective date only provides that the bill is effective July 1, 2020; and does not make any provision for the other effective date. To incorporate this change into Florida Statutes, a direction to the Division of Law Revision may be needed and the effective date of the bill may need to be amended.

Other Comments: Emergency Operations Center Activation Levels

The bill contemplates that the state EOC's activation levels are on a county level; however the state EOC operates its activation levels on a *statewide* basis. It is not clear how this will impact the toll reinstatement provisions of the bill.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.